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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of)	
)	
PETITION TO AMEND RULES)	
OF THE SUPREME COURT OF)	Supreme Court No. R-17_____
ARIZONA: RULES 31, 38, AND 39)	
AND REQUEST FOR LATE FILING)	
_____)	

Pursuant to Rule 28 of the Arizona Supreme Court, Hon. Ryan Andrews, Chief Judge, Salt River Pima Maricopa Indian Community and Hon. Randall Howe, Arizona Court of Appeals, Division 1 as, respectively, Chair and Vice-Chair of the Arizona State, Tribal, and Federal Court Forum respectfully petition this Court to amend Rules 31, 38, and 39, Arizona Rules of the Supreme Court.

I. Background, Purpose and Content of the Proposed Rule Amendments.

The federal Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963, creates a right for tribal governments from other states to participate in Arizona child custody proceedings. Indian tribes from other states seeking to exercise their rights under ICWA by intervening and participating in Arizona child custody proceedings pursuant to the ICWA encounter a high and sometimes prohibitive double financial burden due to provisions in Rule 39 requiring a non-Arizona attorney to pay a fee to appear *pro hac vice* and to associate with an Arizona attorney. The amendment to Arizona Supreme Court Rule 39 would eliminate these requirements, while maintaining all other obligations under that rule. This would allow Indian tribes with limited financial resources and faced with the prohibitive costs of associating with local counsel to assert their rights under federal law to participate in child custody proceedings in Arizona involving tribal children, while preserving the other safeguards imposed on *pro hac vice* attorneys that ensure their competence and accountability.

Due to the large areas of Indian country in Arizona and significant Indian population that includes members of many non-Arizona tribes, some out-of-state tribes may anticipate the need to make multiple appearances in Arizona courts. The need to repeatedly seek *pro hac vice* admission may become a burden on out-of-state tribal government's right to participate in ICWA proceedings as authorized

by federal law. The proposed amendments to Rule 38 would provide for special admission of out-of-state attorneys without fees for the sole purpose of representing tribes in cases subject to the federal ICWA. The out-of-state attorney would be required to take the Arizona law course described in Rule 34(j) and comply with the MCLE requirements of the attorney's home state.

The proposed amendment to Rule 31 would authorize use of a non-lawyer representative designated by a tribe to appear in ICWA proceedings. Often Indian tribes seek to appear in ICWA proceedings in state court through the tribal Director of Social Services, whose job includes overseeing child-custody issues for tribal members. This tribal position necessarily requires intimate familiarity with the procedural and substantive requirements of the ICWA, and with the procedures and organizations of other social service agencies. Dependency matters involving Indian children that are not transferred to tribal court are still governed by ICWA placement preferences and other requirements about which a tribal representative can provide important information. Both the state and the tribe have substantial interests in the tribe participating in ICWA proceedings. These interests could be defeated due to the expense involved in requiring attorney representation. It is likely a tribe would choose in its own interest to send its attorney rather than its Director of Social Services to argue legal issues of jurisdiction or transfer to tribal court, particularly if it has the proposed *pro hac vice* and special admission

options. The proposed rules include protection of the state's interest in adequate representation and compliance with procedure and protocol through authorization of the court to require substitution of counsel.

II. Acceptance of late filing.

The filing of this petition was prompted by news received after the Arizona rule change petition filing deadline of a petition filed in January in the State of Oregon to address this issue in that state. The idea of amending rules to eliminate barriers to tribes participating in ICWA proceedings was immediately recognized as a solution needed in Arizona as well. Petitioners believe the proposed changes are urgent enough to request that the court permit the filing of this petition, though the 2017 deadline for filing rule petitions has passed.

III. Pre-Petition Distribution and Comment.

At its January 27, 2017 meeting, on the recommendation of its ICWA Committee the Arizona State, Tribal, and Federal Court Forum members approved the filing of a rule petition for the purposes stated. We ask that this petition be distributed for comment for consideration in the Court's regular 2017 rules process.

Wherefore petitioners respectfully requests that the Supreme Court amend the Rules of the Supreme Court as set forth in Appendix A.

RESPECTFULLY SUBMITTED this 23rd day of February, 2017.

By /S/
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APPENDIX A
Rules of the Supreme Court of Arizona
Proposed Rule Changes

Rule 31. Regulation of the Practice of Law

a – c [no changes]

(d) Exemptions. Notwithstanding the provisions of section (b), but subject to the limitations of section (c) unless otherwise stated:

1 – 31 [no changes]

32. An officer or employee of a federally recognized Indian tribe who is not an active member of the state bar may represent the Indian tribe before the superior courts in a child custody proceeding as defined by 25 U.S.C. § 1903, pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq. provided that: the Indian tribe has specifically authorized such officer or employee to represent it in the proceeding; such representation is secondary or incidental to other duties related to the office or employment; and the officer or employee is not receiving separate or additional compensation (other than reimbursement for costs) for such representation. Notwithstanding the foregoing provision, the court may require the substitution of counsel whenever it determines that lay representation is interfering with the orderly progress of the litigation or imposing undue burdens on the other litigants.

Rule 38. Special Exceptions to Standard Examinations and Admission Process

a. – i. [no changes]

j. Authorization to Practice Law for Attorneys Representing Indian Tribes for the Purpose of Indian Child Welfare Cases. An attorney who has been admitted to practice law in any other jurisdiction for at least two years may be admitted to practice before the superior and appellate courts of this state for the limited purpose of representing a federally recognized Indian tribe in a child custody proceeding as defined by 25 U.S.C. § 1903, pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq. as provided in this paragraph.

1. Definitions.

A. "ICWA" stands for the Indian Child Welfare Act, which is a federal law passed in 1978. ICWA was passed in response to the alarmingly high number of Indian children being removed from their homes by both public and private agencies. The intent of Congress under ICWA was to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" (25 U.S.C. § 1902). ICWA sets minimum federal standards that apply to state child custody proceedings involving an Indian child who is a member of or eligible for membership in a federally recognized tribe.

B. A federally recognized tribe is an American Indian or Alaska Native tribal entity that is

recognized as having a government-to-government relationship with the United States, with the responsibilities, powers, limitations, and obligations attached to that designation.

2. *Application and Authorization.* An attorney who seeks authorization to practice law under this rule shall file with the clerk of the Supreme Court of Arizona an application including:

A. a certificate from the highest court or agency in the state, territory or district in which the applicant is presently licensed to practice law documenting that the applicant has fulfilled the requirements of active bar membership for at least the two years preceding the date of the application, and that the applicant has not been disciplined for professional misconduct by the bar or highest court of the state, territory or district for the past five years, or during the time of the applicant's licensure, whichever is greater;

B. an affidavit asserting an Indian tribe's intent to intervene and participate in the state court proceeding and affirming the child's membership or eligibility of membership under tribal law; and

C. a sworn statement signed by the applicant that he or she:

i. has read and is familiar with the Rules of the Supreme Court and any applicable statutes of the State of Arizona relative to the conduct of lawyers, and will abide by the provisions thereof;

ii. submits to the jurisdiction of the Court for disciplinary purposes, as defined by the Rules of the Supreme Court;

iii. has not been disciplined by the bar or courts of any jurisdiction within the past five years, or during the time of the applicant's licensure, whichever is greater; and

iv. has successfully completed the course on Arizona law described in Rule 34(j).

The applicant shall send a copy of the application to the State Bar of Arizona, which shall file any objection to such application with the clerk of the Supreme Court within ten (10) days after the date of receipt of such application. An attorney is not allowed to practice law under this rule until the applicant has been authorized to do so by order of the Supreme Court of Arizona. The clerk of the Supreme Court shall send a copy of the order authorizing the practice of law to the State Bar of Arizona.

3. *Mandatory Continuing Legal Education.* An attorney authorized to practice under this paragraph (g) must comply with the Mandatory Continuing Legal Education (MCLE) requirements of the state identified in subsection (2) (A) of this rule.

4. *Expiration of Authorization.* Authorization to practice law under this section shall remain in effect from the date of the order authorizing the applicant to practice law in the State of Arizona until (A) the applicant no longer represents an Indian tribe, as defined by 25 U.S.C. § 1903; participating in a child custody proceeding as defined by 25 U.S.C. § 1903, pursuant to the

Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq.; (B) the applicant is admitted to the practice of law in Arizona pursuant to Rules of the Supreme Court 33 through 37; or (C) two years from the date of the order authorizing the applicant to practice law under this rule, whichever comes first.

5. *Discipline.* In addition to any appropriate proceedings and discipline that may be imposed by the Court under these rules, the Rule 38(j) attorney shall be subject to the following disciplinary measures:

A. civil contempt imposed by the presiding judge or hearing officer for failure to abide by a tribunal's orders in any matter in which the Rule 38(j) attorney has participated; and

B. withdrawal of the certification hereunder, with or without cause, by either the Supreme Court, or the funded indigent defense office.

6. *Limitation of Activities.* An attorney authorized to practice under this rule shall not perform any legal services within the State of Arizona except for the limited purpose of participating in a child custody proceeding as defined by 25 U.S.C. § 1903, pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq. The applicant represents an Indian tribe as defined by 25 U.S.C. § 1903.

7. *Waiver of Fees.* The Attorney who represents an Indian tribe as defined by 25 U.S.C. § 1903, for the limited purpose of participating in a child custody proceeding as defined by 25 U.S.C. § 1903, pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq. shall be exempt from the fees prescribe in A.R.S. Sup.Ct.Rules, Rule 39, Rule 39. Admission Pro Hac Vice.

Rule 39. Admission Pro Hac Vice

a. – l. [no changes]

m. *Exception.* An applicant is not required to associate with local counsel pursuant to subsection (b) and (c) of this rule or pay the fees established by subsection (c)(1)(B) and (h) of this rule if the applicant upon submitting the application required by subsection (c) establishes to the satisfaction of the Bar that:

(1) The applicant seeks to appear in an Arizona court for the limited purpose of participating in a child custody proceeding as defined by 25 U.S.C. § 1903, pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq.;

(2) The applicant represents a federally recognized Indian tribe as defined by Rule 37 of the Rules of Procedure for Juvenile Court; and

(3) The Indian child's tribe has submitted a pleading to the court seeking to intervene and participate in the state court proceeding and affirming the child's membership or eligibility of membership under tribal law.

The applicant shall perform any duty required to be performed by associate counsel and receive any notice required to be provided to associate counsel pursuant to this rule.